Supreme Court, U. S.
FILED
JUN 10 1977
MICHAEL RODAK, JR., CLERK

No. 76-1466

In the Supreme Court of the United States

OCTOBER TERM, 1976

MASAKI HIGA, PETITIONER

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
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Petitioner challenges an administrative determination that he failed to take a timely administrative appeal.

1. In September, 1970, the Department of the Air Force notified petitioner, a career federal employee, that it proposed to terminate his employment on the grounds of disorderly conduct and failure to follow instructions. After considering a written response from petitioner, the Department terminated his employment effective October 16, 1970. In its notice of decision, the Department notified petitioner of his right of appeal either to the Secretary of the Air Force or to the Civil Service Commission, and advised him that any such appeal must be filed within fifteen days from the effective date of his removal (Pet. App. 31).

On October 16, 1970, petitioner met with a union official who according to petitioner agreed to file an administrative appeal to the Civil Service Commission on his behalf. The official failed to file the appeal within the prescribed fifteen-day period. Petitioner filed his own appeal with the regional office of the Commission on August 24, 1971, more than ten months later (Pet. App. 32).

The regional office of the Commission dismissed the appeal as untimely, ruling that petitioner had not been "prevented by circumstances beyond his control from appealing within the time limit" under 5 C.F.R. 752.203 (b)(4) (1970) (Pet. App. 21-22). The Board of Appeals and Review upheld that ruling, stating (Pet. App. 26) that

> the fact that the [petitioner's] representative failed to submit a timely appeal was not a circumstance beyond [petitioner's] control which would warrant the Commission to extend the time limit.

Petitioner then brought this action, claiming that the Commission's refusal to consider his appeal was arbitrary and capricious. On the basis of the administrative record and testimony from petitioner, the district court dismissed the complaint (Pet. App. 28-30). The court of appeals affirmed (Pet. App. 31-33).

2. The Commission's interpretation of its own regulation (5 C.F.R. 752.203(b)(4) (1970)) excusing a failure to file a timely appeal for circumstances beyond an employee's control is subject to considerable deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17; *Northern Indiana Public Service Co.* v. *Izaak Walton League*, 423 U.S. 12. In determining that petitioner had not been "prevented by circumstances beyond his control from appealing within the time limit," the Commission neither abused its

discretion nor acted arbitrarily or capriciously. As the court of appeals observed (Pet. App. 33):

> In this case, [petitioner] merely alleged that he relied on a union official to submit the appeal. He made no showing that he was misled by the union official during the ten-month interim between the effective date of termination and his personal submission of an appeal in August 1971. Neither does the record indicate that [petitioner] was under some disability that rendered him unable to file an appeal personally within the prescribed period. The administrative record contains little or nothing that lends support to [petitioner's] assertion that he was prevented by circumstances beyond his control from filing an appeal to the Commission within the fifteen-day period. On this record, it cannot be said that the Commission abused its discretion or acted arbitrarily and capriciously in denying [petitioner's] administrative appeal.

Contrary to petitioner's claim (Pet. 16), the fifteen-day time limit of 5 C.F.R. 752.203(b) (1970) was not made inapplicable by 5 U.S.C. 7701, which provides for appeals "in writing within a reasonable time after receipt of notice of the adverse decision" in cases involving veteran's preference employees. The fifteen-day limit prescribed in 5 C.F.R. 752.203(b) (1970) constitutes a reasonable agency interpretation of what is "a reasonable time" under the statute, and consequently was properly applied to petitioner. See, *e.g.*, *Udall* v. *Tallman*, *supra*; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

DOJ-1977-06